Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DR. CARL BERNOFSKY,
Petitioner,

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND,
Respondent.

CIVIL APPEAL TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the district court judge was required to recuse herself after she accepted, in the midst of litigation against Tulane University, a Tulane Law School summer teaching assignment in Greece with a stipend of $5500.00.

2. Whether a negative reference letter by an ex-employer is an adverse employment action in a claim for retaliation under Title VII of the Civil Rights Act of 1964.

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The Per Curiam opinion whose review is sought is reproduced in the Appendix at A-30. The District Court opinions are reproduced in the Appendix at A-2 and A-25, respectively.

JURISDICTION

Jurisdiction is proper in this Court. The judgment sought to be reviewed was entered by the U.S. District Court for the Eastern District of Louisiana on April 18, 2000. Subsequently, on May 31, 2000, the trial judge denied a Motion for New Trial and Motion for Recusal. Judgment was rendered after the trial judge accepted a teaching position with a $5,500.00 stipend from the defendant without recusing herself from the case.

The Fifth Circuit Court of Appeals affirmed the district court judgment with a Per Curiam decision entered on April 10, 2001. Dr. Bernofsky filed a Petition for Rehearing En Banc, which was denied on May 14, 2001. The petition was also considered as a Petition for Panel Rehearing, which was similarly denied on May 14, 2001.

The present Petition for Writ of Certiorari is filed within 90 days of the denial of Petition for Panel Rehearing by the Fifth Circuit

and is timely pursuant to 28 U.S.C. § 1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

STATUTES INVOLVED

28 U.S.C. § 455(a) in pertinent part provides:

> A justice, judge, or magistrate of the United States is required to recuse himself "in any proceeding in which his impartiality might reasonably be questioned."

The Code of Conduct for United States Judges, § 3.4-3(a) states:

> A judge who teaches at a law school should recuse from all cases involving that educational institution as a party. The judge should recuse (or remit) from cases involving the university, as well as those involving the law school, where the judge's impartiality might reasonably be questioned in view of the size and cohesiveness of the university, the degree of independence of the law school, the nature of the case and related factors. Similar factors govern recusal of judges serving on a university advisory board.

SUPREME COURT OF THE UNITED STATES
October Term, 2001

DR. CARL BERNOFSKY
Petitioner

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND
Respondent

CIVIL APPEAL TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Dr. Carl Bernofsky, respectfully prays that a Writ of Certiorari be granted to review the decision of the United States District Court for the Eastern District of Louisiana granting Motion for Summary Judgment in favor of the respondent and the affirmation of same by the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

Dr. Bernofsky was a research professor at Tulane University for approximately 20 years. Dr. Bernofsky is Jewish and was fired from his position after Dr. Karam, of Lebanese descent, became his supervisor. Dr. Bernofsky sued Tulane for discrimination based upon race and religion. Dr. Bernofsky was denied a jury trial by the district court judge in his case of discriminatory termination of his employment. In 1997, the district court judge granted summary judgment in favor of Tulane. The U.S. Court of Appeals, Fifth

Circuit, affirmed the decision, and the U.S. Supreme Court denied a petition for certiorari in 1998.

After overcoming some serious health problems that developed at about the time Tulane fired him, Dr. Bernofsky attempted to return to the work force in early 1997. He mailed out over 50 employment inquiries and obtained preliminary interest for his services from the University of Houston and Michigan Technological University.

The University of Houston and Michigan Technological University submitted inquiries to three of Bernofsky's colleagues at Tulane, requesting information about his work performance and other issues that would be of importance in helping these potential employers reach a decision about finding a position for Bernofsky at those institutions. These particular colleagues were selected because, in Dr. Bernofsky's twenty years at Tulane, he mostly worked under Drs. Stjernholm, Steele, and Karam. In fact, Dr. Stjernholm had provided positive reference letters for Dr. Bernofsky in the past. The request from the University of Houston stated, in pertinent part:

> Dr. Carl Bernofsky, formerly of your department, has inquired here about the possibility of an academic position. His training, experience and specialties do have interest for us. Before investigating possibilities with Dr. Bernofsky, I would like to get an evaluation from you as to his performance in research, teaching and departmental citizenship as a faculty member in your department.

(Letter of Dr. Wolinsky to Dr. Stjernholm, Feb. 7, 1997. See A-34.)

Instead of sending their responses, Drs. Stjernholm, Steele, and Karam were instructed not to respond by Tulane's counsel, Mr. John Beal, who took it upon himself to respond in their place. The

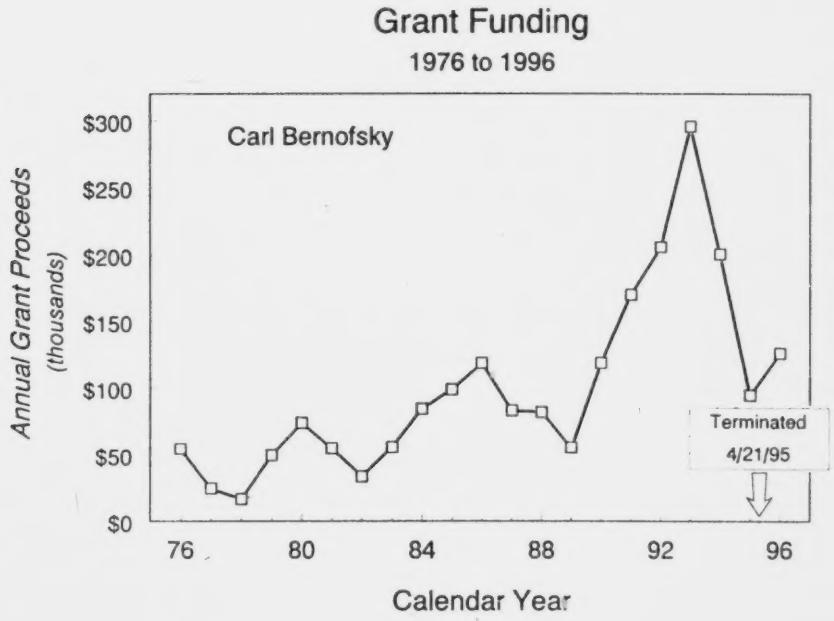
letter, dated Feb. 21, 1997 from Mr. Beal to Dr. Wolinsky of the University of Houston stated as follows:

> You recently sent letters to Dr. Jim Karam, the Chairman of the Department of Biochemistry, as well as Dr. Steele and Dr. Stjernholm in that department concerning Dr. Karl [*sic.*] Bernofsky.
>
> I have directed Dr. Karam that they should not respond to any request relative to Dr. Bernofsky because of pending **litigation brought by Dr. Bernofsky against Dr. Karam personally** and against the University. (Emphasis added)
>
> I can confirm that Dr. Bernofsky was a research professor at Tulane whose position was eliminated because **Dr. Bernofsky no longer had any research funds** to support his position. (Emphasis added) His dismissal was not based on any performance issues, but was strictly a financial decision due to lack of research funds.
>
> Lack of response from Dr. Karam, Dr. Steele, or Dr. Stjernholm personally should not indicate any negative information relative to Dr. Bernofsky, but is necessitated because of the pending litigation.

This letter was not responsive to the request for comment on Dr. Bernofsky's performance. Instead, Mr. Beal volunteered the information about Dr. Bernofsky's lawsuit against Tulane and also incorrectly stated that Bernofsky sued Dr. Karam personally. Dr. Karam is the Chairman of the Biochemistry Department where Bernofsky worked. Beal admitted in his deposition that Dr. Karam was not sued personally.

The letter also falsely stated that Bernofsky no longer had any research funds. Bernofsky's grant funding was actually

promising at the time of his separation, and his grant funding throughout his 20 year career at Tulane indicated a steady upward trend despite cyclic variations that are common to grant funding. The chart below illustrates Bernofsky's grant funding while at Tulane.



Before Bernofsky was terminated, he obtained a U.S. Air Force grant for a quarter million dollars. The final version of the budget of that Air Force Grant was approved by Tulane on 2/24/95 - two months before Bernofsky's termination on 4/21/95. The grant provided $124,921 for year 1 and $125,955 for year 2.

In February, 1999, before Tulane offered Judge Berrigan the teaching assignment in Greece, Chief Judge King dismissed a judicial misconduct complaint filed by Dr. Bernofsky, which alleged that Judge Berrigan should have recused herself based on her ongoing adjunct professorship at Tulane Law School and her prior service on the Board of Directors of Tulane's Amistad Research

Center. Bernofsky appealed that complaint to the U.S. Supreme Court as Case No. 99-372, which was denied.

Bernofsky filed the case presently before this Court because Tulane gave him a negative reference letter when he applied for work at the University of Houston and because Tulane did not respond at all to a reference inquiry from Michigan Technical University.

Judge Berrigan learned in November, 1999, that she was being awarded a teaching assignment in Greece for the summer of 2000. The three-week assignment included a stipend of $5,500.00. She did not disclose this fact to Dr. Bernofsky or his counsel of record. This non-disclosure was particularly egregious because Dr. Bernofsky had tried to get Judge Berrigan to recuse herself on several prior occasions.

Dr. Bernofsky learned of Judge Berrigan's teaching assignment in Greece in April, 2000 and immediately wrote her a letter asking for her recusal. See A-35. Judge Berrigan did not respond to that letter. However, two weeks after Bernofsky's request for recusal, Judge Berrigan issued her ruling on the merits of the case, granting summary judgment in favor of Tulane and dismissing all of Dr. Bernofsky's claims. See A-1 and A-2.

The Per Curiam decision of the Fifth Circuit affirmed the actions of the district court judge. However, the dissent by Chief Judge Carolyn Dineen King stated that the district court judge should have recused herself, and that the Chief Judge would reverse the judgment and remand with instructions to send the case to another judge. See A-31.

Despite the Chief Judge's dissent, the Fifth Circuit denied a Petition for Rehearing En Banc. See A-32.

Unbeknownst to Dr. Bernofsky and his counsel at the time of oral argument on April 3, 2001, Justice Scalia had recused himself

from consideration of a petition for certiorari in the case of Asher Rubinstein v. The Administrators of the Tulane Educational Fund, Case Nos. 00-789 and 00-996, which involved the same defendant as the case at bar. Justice Scalia participated in the Tulane Summer School Abroad program four times and is scheduled to go to Greece during the summer of 2001 in the same type of position that Judge Berrigan held in 2000. Although both Justice Scalia and Judge Berrigan taught in the same Tulane Law School summer program in Greece, Justice Scalia recused himself from participating in the Rubinstein case with Tulane as a party, whereas Judge Berrigan would not recuse herself from the case at bar.

REASONS FOR GRANTING WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I. Introduction

Petitioner submits the following in support of his writ of certiorari to review the decision of the Fifth Circuit Court of Appeals affirming the District Court, Eastern District of Louisiana, granting respondent's Motion for Summary Judgment.

In granting summary judgment, the lower court departed from the accepted standard of review set by this Court in Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000). This departure was sanctioned by the Fifth Circuit Court of Appeals. In addition, the trial judge failed to recuse herself from the case after the defendant gave her a "plum" assignment in Greece with a stipend of $5,500.00.

Further, the decision of the Fifth Circuit Court of Appeals conflicts with the decisions of the Third and Ninth Circuit Courts of Appeals on the issue of whether a negative job reference by an ex-employer is an adverse employment action in a retaliation claim under Title VII. For these reasons, the petition for writ of certiorari should be granted.

II. Standard of Review for Summary Judgment

In reviewing summary judgment, the court must view the evidence presented in light most favorable to the party opposing the motion. Rhodes v. Guiberson Oil Tools, 75 F.3d 959 (5th Cir. 1996). In the recent case of Reeves v. Sanderson Plumbing Products, Inc., the unanimous U.S. Supreme Court reaffirmed that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that the inquiry under each is the same." Reeves, at 2110. This Honorable Court held that, although all of the evidence should be reviewed by the court, not all evidence should be given weight. The court "must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller, at 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.'" Reeves, at 2110. In the present case, a jury question is present because the petitioner presented evidence that, when taken as a whole, created a fact issue as to whether the negative reference letter was retaliatory and/or defamatory.

III. The district court judge abused her discretion in not recusing herself after she accepted a Tulane law school summer teaching assignment in Greece with a stipend of $5,500.00 on the eve of her decision to grant summary judgment in favor of Tulane.

Chief Judge King in her dissent stated that a reasonable person would view the summer teaching assignment in Greece as "something of a plum." The position itself is one of prestige. The following Justices of the U.S. Supreme Court have taught at the Tulane Law School Summer School Abroad program:

> Justice Antonin Scalia - 1987, 1991, 1997, 2001; Justice Harry Blackmun - 1992; Chief Justice William Rehnquist - 1995, 1997; Justice Ruth Bader Ginsburg - 1999; and Justice Stephen Breyer.

To state the obvious, there is prestige in being asked to participate in a program whose past participants included five Justices of the U.S. Supreme Court. Chief Justice Rehnquist and Justice Scalia participated in the program more than once.

At oral argument, when Counsel for Bernofsky recited the above participation of the U.S. Supreme Court Justices who were presumably paid by Tulane for teaching in its summer program abroad, Circuit Judge Reavely asked:

JUDGE REAVLEY:

> Would they all be recused if Cert is applied for?

MR. FARRUGIA:

> . . . I'm not sure that just the consideration of Cert would warrant them recusing themselves. But I think [if] the case actually got to the Supreme Court, and it was Justice Scalia who has gone four times on Tulane's nickel, and a case came up with Tulane, I think Justice Scalia probably should recuse himself, yes.

Tulane was involved in two petitions for certiorari that recently went before the U.S. Supreme Court: Administrators of the Tulane Educational Fund v. Rubinstein, Case No. 00-789, filed 11/13/00, and Rubinstein v. Administrators of the Tulane Educational Fund, Case No. 00-996, filed 12/15/00. Attorney Shuler was Counsel of Record for Tulane in both Rubinstein cases.

Counsel for Dr. Bernofsky correctly opined at oral argument that Justice Scalia, who was presumably paid by Tulane to teach in Greece this year, should recuse from cases in which Tulane is a party. In the above two Supreme Court cases involving Tulane, **Justice Scalia did, in fact, recuse himself** from both the

consideration and decision of these petitions, which were denied by order on March 19, 2001.

Attorney Shuler, who would have known by April 3rd that Justice Scalia had recused himself from the above Tulane cases, was not forthcoming with this information to the appellate court, even though the court had indicated a strong interest in this issue earlier in the proceeding. Shuler's oral argument, nevertheless, included the line of reasoning that, because the U.S. Supreme Court Justices did not recuse themselves, Judge Berrigan does not have to recuse herself:

> MR. SHULER:
>
> Indeed, if such was the law, Justices Ginsburg, Scalia, Blackmun and Rehnquist would have to recuse themselves from Bernofsky's writ application, his mandamus application in the earlier case, inasmuch as they also taught at Tulane's Summer Program in Greece. You can see Plaintiff's record excerpt 15 for the evidence of that. **There's no rule that supreme court justices or appellate justices are treated differently under the Code of Judicial Conduct than the trial judges.**
>
> **Under 455A, if Judge Berrigan is presumed to have an appearance of partiality because she taught at Tulane's Summer Program in Greece, so too did Justices Blackmun, Scalia, Rehnquist and Ginsburg.** (Bold emphasis added).

This is a strange and misleading statement from the counsel of record in the Rubinstein cases, since it was made two weeks after Justice Scalia recused himself from those cases.

Clearly, Judge Berrigan, who is in a similar position as Justice Scalia with respect to the receipt of funds from Tulane to teach abroad, should have recused herself from these proceedings involving Tulane. The federal law recusal statute is mandatory, not optional. The Fifth Circuit has set the standards for recusal in the case of Levitt v. University of Texas at El Paso, et al., 847 F.2d 221 (5th Cir. 1988):

> Under 28 U.S.C. § 455(a), a justice, judge, or magistrate of the United States is required to recuse himself in any proceeding in which his impartiality might reasonably be questioned.
>
> Because 28 U.S.C. Section 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street.

The opinion of the average person on the street would surely agree with the opinion of Chief Judge King that there is an appearance of partiality when a judge decides a case in favor of a party who gives that judge a "plum" teaching assignment in Greece with a $5,500.00 stipend.

Judge Berrigan also had a duty to disclose the facts of her teaching assignment to Dr. Bernofsky and his counsel. Liteky v. U.S., 510 U.S. 540, 548, 114 S.Ct.1147, (1994). She failed to make this disclosure.

The second reason that Judge Berrigan should have recused herself is that the Code of Conduct for United States Judges mandates recusal for any judge who teaches at a law school. Section 3.4-3(a) of the Code provides:

> A judge who teaches at a law school should recuse from all cases involving that educational institution as a party. The judge should recuse (or remit) from cases involving the university, as well as those involving the law school, where the judge's impartiality might reasonably be questioned in view of the size and cohesiveness of the university, the degree of independence of the law school, the nature of the case and related factors. Similar factors govern recusal of judges serving on a university advisory board.

Judge Berrigan states in her opinion that this rule does not provide clear guidance. See A-28. She argues that the first sentence does not distinguish between a paid and unpaid teaching position. However, that distinction became irrelevant when Tulane paid Judge Berrigan a stipend of $5,500.00.

At oral argument, Chief Judge King asked both counsel for Dr. Bernofsky and counsel for Tulane for information on the relationship of Tulane's Law School to Tulane University:

> . . .[W]hat do we know from this record
> about the size and cohesiveness of Tulane University,
> the degree of independence of the law school.
> What do we know about that on this record?

Chief Judge King in her dissent stated that, since there is no evidence of attenuation in the relationship between the Fund (Tulane University) and the Law School, she would conclude that a reasonable person might question Judge Berrigan's impartiality. See A-31. The burden of producing evidence of attenuation in that relationship, if any, would be upon Tulane and not Dr. Bernofsky.

It should be noted that three judges previously recused themselves from the present case because of their association with

Tulane: Magistrate Judge Lance M. Africk, District Court Judge Ivan L.R. Lemelle, and Magistrate Judge Joseph C. Wilkinson, Jr.

Chief Judge King concluded her dissent by stating that she would reverse the judgment and remand with instructions to send the case to another judge. See A-31.

IV. The district court erred in concluding that under Mattern v. Eastman Kodak Company, 104 F.3d 708 (5th Cir. 1997), the negative reference letter is not an adverse employment action in a claim for retaliation under Title VII of the Civil Rights Act of 1964.

The district court held that a negative reference letter is not an adverse employment action. See A-10 to A-13. The district court went on to state that the adverse employment action was the failure of the prospective employer to hire Bernofsky. Because of this position, the district court concluded that Bernofsky offered no proof that the negative letter of reference to the University of Houston and the non-response to Michigan Technological University were determinative factors in his not being hired by those institutions. Although this is not true, and although Bernofsky did offer evidence that he would have made the short list of candidates at the University of Houston but for the negative reference letter, this entire line of inquiry is misplaced.

If the district court had correctly concluded that a negative reference letter is an adverse employment action, it would not be necessary to prove that Bernofsky was not hired because of the letter to the University of Houston and the non-response to Michigan Technological University.

The district court invited the Fifth Circuit to revisit its minority position on what constitutes an adverse employment action stated in Mattern v. Eastman Kodak Company, 104 F.3d 708 (5th Cir. 1997). See A-12. Using the restrictive language in Mattern, the

district court concluded that a negative reference letter was not an adverse employment action.

There is a clear split in the Circuit Courts of Appeal on the issue of what constitutes an adverse employment action in a retaliation case under Title VII.

Only one other circuit has adopted the most restrictive test along with the Fifth Circuit. The Eighth Circuit also holds that only "ultimate employment actions" such as hiring, firing, promoting and demoting constitute actionable adverse employment actions. Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (transfer involving only minor changes in working conditions and no reduction in pay or benefits is not an adverse employment action).

However, even the Eighth Circuit, in the case of Smith v. St. Louis University, 109 F.3d 1261, at 1266 (8th Cir. 1997), has held that negative references are adverse employment actions. "We think that actions short of termination may constitute adverse actions within the meaning of the statute." citing Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3rd Cir.) ("Post-employment blacklisting is sometimes more damaging than on-the-job discrimination . . ."), cert. denied, 513 U.S. 1022, 130 L.Ed. 2d 503, 115 S. Ct. 590 (1994). The Eighth Circuit held that, if the ex-employer provided negative references to the plaintiff's potential employers, and if the plaintiff demonstrates that the ex-employer did so because the plaintiff had complained about that employer's harassment, then a jury could reasonably conclude that the university was liable under Title VII for retaliation.

The fact that the Eighth Circuit, which has the same strict view as the Fifth Circuit of what constitutes an adverse employment action, held that a negative reference by an ex-employer is an adverse employment action, indicates that the district court was in error in its ruling, and that the Fifth Circuit now stands alone in the Circuit Courts of Appeal in sanctioning this opinion.

The Second and Third circuits hold an intermediate position within the circuit split. They have held that an adverse action is something that materially affects the terms and conditions of employment. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3rd Cir. 1997) ("retaliatory conduct must be serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment ... to constitute [an] 'adverse employment action'.") Even with this position, the Third Circuit held the following in Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198-200 (3rd Cir. 1994), cert. denied, 513 U.S. 1022, 115 S.Ct. 590, 130 L.Ed.2d 503 (1994):

> The need for protection against retaliation does not disappear when the employment relationship ends. Indeed, post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued.

Charlton, 25 F.3d at 200. The Third Circuit in Charlton also held that the retaliation provision includes former employees as long as the alleged discrimination is related to or arises out of the employment relationship.

In the case of EEOC v. LB Foster Company, 123 F.3d 746, 754, n4 (3rd Cir. 1997), the Third Circuit held that the adverse employment action was the negative reference of the ex-employer and not the non-hiring by the prospective employer:

> The district court improperly focused on the action of the prospective employer and not L.B. Foster in determining whether the EEOC had presented evidence of an adverse employment action. The district court concluded that '[t]here is no evidence

> that Foster's response to the telephone call from Johnston Pump negatively influenced Wilson's application for employment with Johnston Pump.' App. at 588. However, that is not the proper test. All that is required to establish a prima facie case of retaliatory discrimination is proof (1) that the plaintiff engaged in protected activity, (2) that the employer took an adverse action against her, and (3) that a causal link exists between the protected activity and the employer's adverse action. Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173 (3rd Cir. 1997). An employer who retaliates can not escape liability merely because the retaliation falls short of its intended result.

LB Foster, at 754.

Therefore, even under the Third Circuit's intermediate position on what constitutes an adverse employment action, the Third Circuit has held that a negative job reference by an ex-employer is an adverse employment action.

In Torres v. Pisano, 116 F.3d 625, 640 (2nd Cir. 1997), the Second Circuit held that, to show an adverse employment action, an employee must demonstrate "a materially adverse change in the terms and conditions of employment." Along with the Third Circuit's intermediate position on what constitutes an adverse employment action, the Second Circuit also held that if an employer refused to provide a former employee with post-employment reference letters in retaliation for the employee's filing of charges with the Commission, that would violate 42 U.S.C.A. Section 2000e-3 (Title VII's anti-retaliation statute). Pantchenko v. C. B. Dolge Company, Inc., 581 F.2d 1052 (2nd Cir. 1978). Again, the emphasis here is on the retaliatory action by the former employer and not whether or not his failure to provide letters of reference actually caused the employee not to be hired by a prospective employer.

The First, Seventh, Tenth, Eleventh and D.C. Circuits all take an expansive view of the types of action that can be considered adverse employment actions. Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (adverse employment actions include "demotions, disadvantageous transfers or assignments, refusals to promote, **unwarranted negative job evaluations** and toleration of harassment by other employees") (Emphasis added); Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (employer can be liable for retaliation if it permits "actions like moving the person from a spacious, brightly lit office to a dingy closet, depriving the person of previously available support services ... or cutting off challenging assignments"); Corneveaux v. CUNA Mutual Ins. Group, 76 F.3d 1498, 1507 (10th Cir. 1996) (employee demonstrated adverse employment action under the ADEA by showing that her employer "required her to go through several hoops in order to obtain her severance benefits"); Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (malicious prosecution by former employer can be adverse employment action); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) (Act of defendant, plaintiff's former employer, in advising a prospective employer of fact that plaintiff had filed a sex discrimination charge against defendant was an act of retaliation and, as such, a violation of Title VII, making it an "unlawful employment practice" for an employer to discriminate against an employee for making a discriminatory employment charge); Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) (adverse employment actions include an employer requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment); Passer v. American Chemical Soc., 935 F.2d 322, 330-331 (D.C. Cir. 1991) (employer's cancellation of a public event honoring an employee can constitute adverse employment action under the ADEA, which has an anti-retaliation provision parallel to that in Title VII).

The Ninth Circuit has held that the Navy's retaliatory dissemination of negative employment reference violated Title VII, even if the negative reference did not affect the Army's subsequent decision not to hire Ms. Hashimoto, who had earlier claimed discriminatory action by the Navy. Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997), certiorari denied, 118 S.Ct. 1803, 523 U.S. 1122, 140 L.Ed.2d 943.

In Hashimoto, an Asian-American woman alleged that the Department of Navy gave her a negative job reference in retaliation for filing an EEOC complaint. The Ninth Circuit recognized that, unlike most cases alleging retaliation where the retaliatory conduct takes the form of discharge, demotion, failure to promote, or the like, a retaliatory negative job reference does not itself inflict tangible employment harm because it requires a prospective employer's subsequent, adverse action in response to the reference to create the employment harm. Id.

The Ninth Circuit in Hashimoto found that the dissemination of an unfavorable job reference was an adverse employment action "because it was a 'personnel action' motivated by retaliatory animus." The Ninth Circuit so found even though the defendant proved that the poor job reference did not affect the prospective employer's decision not to hire the plaintiff: "That this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability." In this case, the Navy was ordered to stop notifying prospective employers of its employees' or former employees' participation in protected activity. Id.

The EEOC has interpreted "adverse employment action" to mean "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual, Section 8, "Retaliation," Para. 8-II(D3) (1998). Although EEOC Guidelines are not binding on the courts, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Savings Bank v. Vinson, 477

U.S. 57, 65, 91 L.Ed. 2d 49, 106 S. Ct. 2399 (1986) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140, 89 L.Ed. 124, 65 S. Ct. 161 (1944)).

The EEOC test covers lateral transfers, changes in work schedules, and unfavorable job references. These actions are all reasonably likely to deter employees from engaging in protected activity. The EEOC test is consistent with the holdings in the First, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits.

This Honorable Court should decide what constitutes an adverse employment action in a retaliation case because the split in the circuit courts leads to different results in retaliation cases under Title VII.

Although Mattern does not discuss the issue of whether a negative reference letter is an adverse employment action, the district court ruling that a negative reference letter is not an adverse employment action is contrary to decisions in the Third and Ninth Circuits. Mattern only discusses pre-termination events such as disciplinary filings and reprimands when it gives examples of employment actions that it considers not to be adverse employment actions. The Fifth Circuit states that these lesser employment actions may jeopardize employment in the future. Mattern, at 708. The implication in this language is that if these employment actions lead to the ultimate employment decision of termination, then the employee will have an actionable adverse employment action.

However, Bernofsky had been terminated long before the negative reference letter was written. The holding by the district court that, under Mattern, a negative reference letter is not an adverse employment action, is inconsistent with the language of Mattern, inconsistent with case law, and results in the untenable conclusion that there is no remedy for retaliation by an employer after the employee leaves his employment unless the ex-employee can prove that he was not hired by a subsequent employer because of the negative reference. This is an unreasonable burden because

with a negative reference, a prospective employee will not get an interview for a job and, without being interviewed, proof of the reason for not being hired is nearly impossible.

The Fifth Circuit's Per Curiam decision sidestepped the issue of whether the negative reference letter is an adverse employment action by stating, "even if Tulane's responses to the requests for reference be considered as adverse employment actions, there was no error of any significance and Bernofsky presents no evidence of improper motive or defamation." See A-30 and A-31.

However, Dr. Bernofsky did present evidence of improper motive and defamation. The improper motive of Mr. Beal, attorney and agent for Tulane, is evident in his letter which volunteered the information that Dr. Bernofsky sued Tulane. This is exactly what the Navy was ordered by the Ninth Circuit in Hashimoto to stop doing, namely notifying prospective employers of former employees' participation in protected activity. The reference request did not ask for reasons for termination, but rather just for an evaluation of past performance. The defamatory intent of the letter is obvious when Beal falsely states that Bernofsky had no research funds at a time when he had an Air Force grant of a quarter million dollars.

Other evidence of Mr. Beal's illegal motive is his statement that the letter of reference is being sent by him because of Bernofsky's pending discrimination litigation.

Mr. Beal's defamation and illegal motive is also apparent from the deposition testimony of Dr. Stjernholm, who stated that, if Beal had not taken over the task of responding to Dr. Wolinsky, he would have written a positive letter of reference for Bernofsky. Stjernholm further testified that, if he received a letter of reference stating that a candidate had sued the department chair personally, it would be "a red flag," and he would "immediately throw out" that application for employment.

Further evidence of defamation and illegal motive, ignored by the Fifth Circuit in contradiction of this Court's holding in Reeves v. Sanderson Plumbing Products, Inc., is the deposition testimony of Dr. Wolinsky, who was attempting to locate a position for Dr. Bernofsky at the University of Houston. Wolinsky testified that the statement in Beal's letter that Bernofsky had sued his previous chair was the "kiss of death" for any of his efforts to help him find work. Similarly, Dr. Thomas Dalton stated, in his expert witness report, that Beal's letter would be "a death knell" to any application for employment at an academic institution.

At the summary judgment stage, the above evidence should have been viewed in the light most favorable to Dr. Bernofsky. The Fifth Circuit ignored this principle.

In the case of Robinson v. Shell Oil Co., 519 U.S. 337 (1997), this Honorable Court reversed a Fourth Circuit decision and held that a former employee does have the protection of Title VII's anti-retaliation provisions. In that case, while an EEOC charge was pending, the ex-employee applied for a job with another company that contacted his former employer for an employment reference.

Claiming that his former employer gave him a negative reference in retaliation for his having filed the EEOC charge, the ex-employee filed suit under § 704(a) of Title VII, which makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have availed themselves of Title VII's protections. In deciding the Robinson case, this Court allowed a cause of action for a negative job reference by a former employer who gave the negative reference in retaliation for an ex-employee exercising his rights under Title VII.

This Honorable Court in Robinson did not require the ex-employee to prove that he was not hired because of the negative reference. The Fifth Circuit should not be exempted from that standard.

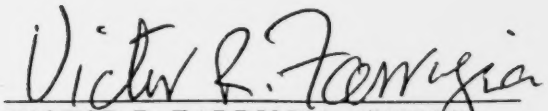
CONCLUSION

Viewing all evidence in light most favorable to the petitioner, which is the standard that is applicable to the review of summary judgment, questions of material fact exist with regard to whether the negative reference letter was retaliatory and/or defamatory. In addition, the district court did not recuse itself under circumstances in which a reasonable person might question the impartiality of the district court judge. Fundamental to the litigant is the right to a fair and impartial trial. Fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside. U.S. v. Jordan, 49 F.3d 152, 156 (5th Cir. 1995). Public confidence in the impartiality of our judges will be shattered if this Court does not reverse the judgment and remand this case to a judge who appears to be impartial.

Of further significance for purposes of this writ application is the split in the circuits over whether a negative reference letter by a previous employer is an adverse employment action in a retaliation claim under Title VII. On this issue, there is a clear and distinct conflict between the holding of the Third and Ninth Circuit Courts of Appeal and the opinion of the district court, which was upheld by the Fifth Circuit in the present case. Resolution of this important conflict merits the attention of this Court.

The petitioner, therefore, urges this Honorable Court to grant a writ of certiorari to correct the error of the lower court and to resolve the conflict of law that exists in the circuit courts.

Respectfully submitted,



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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DR. CARL BERNOFSKY	CIVIL ACTION
VERSUS	NUMBER: 98-1792 c/w 98-2102 **REF: BOTH CASES**
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND	SECTION "C" 5

J U D G M E N T

In accordance with the court's order and reasons issued April 18, 2000,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Administrators of the Tulane Educational Fund, and against plaintiff, Carl Bernofsky, dismissing said plaintiff's complaint with prejudice.

IT IS FURTHER ORDERED that the motion by the Administrators of the Tulane Educational Fund to strike the affidavit of Carl Bernofsky (record document #78) is DISMISSED as moot.

New Orleans, Louisiana, this 18 day of April 2000.

s/ *Helen G. Berrigan*
HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DR. CARL BERNOFSKY	CIVIL ACTION
VERSUS	NO. 98-1792 c/w 98-2102
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND	SECTION "C"

ORDER AND REASONS

This matter comes before the Court on motion for summary judgment filed by the defendant, the Administrators of the Tulane Educational Fund ("Tulane") and motions in limine. Having considered the record, the memoranda of counsel and the law, the Court finds that summary judgment is appropriate for the following reasons.

The plaintiff, Dr. Carl Bernofsky ("Bernofsky"), formerly worked at Tulane University Medical School. His original suit for race and age discrimination as well as various state law claims against Tulane was dismissed on summary judgment and affirmed on appeal. Bernofsky v. Tulane University Medical School, 962 F.Supp. 895, 897 (E.D.La. 1997), aff'd, 136 F.3d 137 (5th Cir. 1998). He now sues Tulane for retaliation under 42 U.S.C. § 1981 and Title VII and for retaliation and defamation under Louisiana state law in conjunction with requests for references on employment applications.

A review of the factual events leading up to the plaintiff's termination are necessary to place the current claims in context.[1]

Bernofsky was a Research Professor in the Biochemistry Department at Tulane Medical School. It is undisputed that as a research professor, Bernofsky was responsible for raising the bulk of his own salary through research grants. From his arrival at Tulane in 1975 until 1986, he was apparently generally successful. From 1986 forward, however, Tulane provided salary support ranging from roughly 70% - 100% a year. In the 1993-1994 cycle, Tulane provided 100% of Bernofsky's salary. (Civ. Act. 95-358, Rec. Doc. 55, Exh. D). In exchange for such salary support, a research professor is supposed to teach and participate in other departmental activities.

In March, 1994, the Department Chairman, Dr. Jim D. Karam ("Karam") advised the Dean of the School of Medicine that he had "serious reservations" about recommending Bernofsky for reappointment in the 1994-1995 academic year. (Civ. Act. 95-358, Rec. Doc. 55, Exh. F). Karam cited Bernofsky's "minimal participation in Departmental duties, his general lack of collegiality, and his sub-average contribution to the intellectual environment in the Department" as well as his "below expectations" performance in science. Karam also pointed out that the Department had been paying most of Bernofsky's salary "yet he has done little in return to contribute to our intellectual growth or to a positive atmosphere." In May, 1994, Karam appointed a Faculty Review Committee ("Committee"), consisting of the former department chairman, Professor Rune L. Stjernholm ("Stjernholm"), Emeritus Professor Richard H. Steele ("Steele")

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[1] These factual findings are drawn from pleadings filed in Dr. Bernofsky's underlying lawsuit, Civil Action 95-358 "C". References to this first suit shall begin with "Civ. Act. 95-358." All other undesignated record document references are to this immediate record.

and a third professor, to evaluate Bernofsky's performance. (Civ. Act. 95-358, Rec. Doc. 55, Exh. D). In that evaluation, the Committee noted the salary support from Tulane, noted that Bernofsky has a "very light teaching load"; that he "does not participate or is exempt" from all other course related activities and that he did not participate in any of the departmental committees. With respect to his research, the Committee found that from 1958 through 1986, Bernofsky's published work had been in "outstanding referral journals" but that since 1986, his research had been published in only obscure journals. The Committee also stated that his then active grants were all due to terminate shortly and that he had been unsuccessful in seeking new funding, despite a number of applications. The Committee noted that "70% of Dr. Bernofsky's effort is now spent on writing, revising or resubmitting grant proposals in an endless manner." They concluded that his "research activities and accomplishment are not competitive."

After receiving this report, Karam issued a memorandum to Bernofsky, indicating that he would recommend Bernofsky for reappointment as a Research Professor, but with certain stipulations. (Civ. Act. 95-358, Rec. Doc. 55, Exh. E). Karam provided a copy of the Committee Report with his memorandum. He noted Bernofsky's obligation to sustain his own salary through grant funding and noted that Tulane had been paying a heavy percentage of his salary for a number of years. Karam was critical of Bernofsky's "modest" research productivity; his "minimal" service to the Department; his unwillingness to teach; and his reclusiveness and lack of scholarly interaction with colleagues. He rated his overall performance for the last three years as "largely unsatisfactory" and gave him 10 months to show "significant improvement." The thrust of the requirements were that Bernofsky had to generate funding for his salary and accept teaching responsibilities. According to Karam's memo, Bernofsky's approved Tulane salary for 1993-94 had been $65,453. Bernofsky declined to teach under the terms set forth by

Karam. In a memorandum of August 16, 1994, Karam advised Bernofsky that he would provide "one more chance" for him to secure grant support for his research and salary, placing him on a 6-month termination notice, which would expire in February, 1995. (Civ. Act. 95-358, Rec. Doc. 55, Exh. O). In December, Karam once again advised Bernofsky of the February deadline for grant funding to cover his salary. (Civ. Act. 95-358, Rec. Doc. 55, Exh. P). On January 31, 1995, Karam formally notified Bernofsky of his termination, effective February 28, 1995. (Civ. Act. 95-358, Rec. Doc. 55, Exh. Q).

Also on January 31, 1995, Bernofsky filed his original lawsuit, alleging that his imminent termination was discriminatory. (Civ. Act. 95-358, Doc. 1). The plaintiff requested injunctive relief. (Civ. Act. 95-358, Doc. 3). The Court ordered the parties to enter into settlement discussions and likewise ordered that "the status quo" be maintained with respect to Bernofsky's employment, pending those discussions. (Civ. Act. 95-358, Doc. 13). Extensive settlement discussions followed, but were terminated unsuccessfully in late March, 1995. (Civ. Act. 95-358, Docs. 16, 18, 19). Bernofsky's employment with Tulane ended as of April 21, 1995. In June, 1995, Karam notified the Dean of the School of Medicine, Dr. James Corrigan, that "Termination of his position is due to lack of current research funding by the faculty member." (Civ. Act. 95-358, Doc. 55, Exh. R).

In February, 1995, while settlement discussions were ongoing, Bernofsky was notified by the United States Department of Air Force that a grant proposal he had submitted was going to be recommended for approval. The letter noted that funding had not yet been allocated and a contract would be necessary. (Rec. Doc. 77, Exh. 41). In Bernofsky's proposed budget to the Air Force, he identified his first year salary from the grant as $13,679. (Rec. Doc. 77, Exh. 47). The total proposed grant for the first year was approximately $125,000 and approximately $126,000 for the second year, if renewed. It is undisputed that in mid-February,

Tulane was aware of the Air Force's action. (Rec. Doc. 77, Exh. 44).

In his initial lawsuit and subsequently amended lawsuit, filed January 31 and February 27, 1995, respectively, Bernofsky challenged his termination as being discriminatory. (Civ. Act. No. 95-358, Rec. Docs. 1 & 14). While his suit named Tulane University Medical School as the defendant, the only person identified as responsible for his complaints was Karam. The allegations against Karam were pervasive, specific and personal. Bernofsky alleged that immediately after Karam's appointment as Department Chairman, he "interfered and discriminated against plaintiff in a myriad of ways", including refusing to provide space for a machine Bernofsky wanted[2]; that throughout 1994, Karam "harassed plaintiff" about additional new funding and that Karam gave "false and misleading information" to possible funding sources making it "impossible" for the plaintiff to secure funds before his 1994 grants expired[3]; that Karam "devised a scheme to produce an unflattering evaluation of plaintiff"[4]; and that Karam "interfered" with the plaintiff's staff and "forced" their resignations.[5] Finally, Bernofsky alleged that Karam "elected to terminate his appointment for 1995, refused to reappoint him for 1996, and refused to put his name up for conversion to a tenured

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[2] Civ. Act. 95-358, Doc. 14, Para. 30-31.

[3] Civ. Act. 95-358, Doc. 14, Para. 36.

[4] Civ. Act. 95-358, Doc. 14, Para. 37.

[5] Civ. Act. 95-358, Doc. 14, Para. 38-39.

position."[6] The basis of Karam's decisions was allegedly anti-Semitism and age discrimination.[7]

While this lawsuit was pending at the district court level, Bernofsky applied to various other institutions for employment. In his applications, he apparently identified Professors Karam, Stjernholm and Steele as his references. Karam, of course, is the Department Chairman who terminated Bernofsky and who at that point in time bore the entire brunt of Bernofsky's active allegations of discriminatory treatment. Stjernholm was the chairman of the Faculty Committee whose unflattering critique of Bernofsky was openly relied upon by Karam in putting Bernofsky on his initial probationary period prior to termination. Steele was the second of the three members of that Faculty Committee. Bernofsky listed each of these individuals as references without requesting their permission or even notifying them that he had done so.

The focus of this lawsuit and these motions is the defendant's responses to two requests for recommendations from two universities to which the plaintiff had applied for employment after his termination from Tulane. It is undisputed that with regard to the first university, University of Houston ("UH"), the Tulane professors responded by referring the inquiry to John Beal ("Beal"), in-house counsel for Tulane. Beal wrote Dr. Ira Wolinsky ("Wolinsky") of the University of Houston a letter on February 21, 1997. That letter provided as follows:

> You recently sent letters to Dr. Jim Karam, the Chairman of the Department of Biochemistry, as well as Dr. Steele and Dr. Stjernholm in that department concerning Dr. Karl Bernofsky.

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[6] Civ. Act. 95-358, Doc. 14, Para. 49.

[7] Civ. Act. 95-358, Doc. 14, Para. 50-51.

> I have directed Dr. Karam that they should not respond to any request relative to Dr. Bernofsky because of pending litigation brought by Dr. Bernofsky against Dr. Karam personally and against the University.
>
> I can confirm that Dr. Bernofsky was a research professor at Tulane whose position was eliminated because Dr. Bernofsky no longer had any research funds to support his position. His dismissal was not based upon any performance issues, but was strictly a financial decision due to lack of research funds.
>
> Lack of a response from Dr. Karam, Dr. Steele or Dr. Stjernholm personally should not indicate any negative information relative to Dr. Bernofsky, but is necessitated because of the pending litigation.

Bernofsky learned about this letter in March 1997. Thereafter, he contacted Wilbur Campbell ("Campbell") with Michigan Technological University ("MTU"), who sent letters requesting references from Tulane with no response. The plaintiff also complains in general that he has applied to 50 potential university employers with no response because of Tulane's retaliation.[8]

Retaliation

The plaintiff alleges that the Beal letter to Wolinsky and Tulane's silence in response to the inquiry from Campbell were

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[8] The plaintiff's opposition does not discuss these 50 other applications in any detail, which indicates to the Court that he is not pursuing claims based on them.

retaliatory under federal and state law. With respect to the state law claim, Tulane argues that certain legislative amendments to Louisiana's anti-discrimination laws in 1997 effectively deleted, presumably inadvertently, any state claim based on retaliation. Tulane also argues that if such a claim exists statutorily, it has prescribed since Bernofsky did not challenge the responses as retaliatory until he amended his petition, over a year after learning of the Beal letter. The plaintiff's original petition simply alleged the Beal letter was defamatory.

The Court will assume for purposes of this motion, that Bernofsky's state law claim of retaliation survive these objections and move to the substantive merit of the claim.[9]

The parties appear to agree that in order to establish a prima facie claim of retaliation under Title VII, Section 1981 and Louisiana law, the plaintiff must show: (1) the employee engaged in activity protected by Title VII; (2) the employer took adverse employment action against the employee; and (3) a causal connection between the protected activity and the adverse employment action. Burger v. Central Apartment Management, Inc., 168 F.3d 875, 878 (5th Cir. 1999); Mattern v. Eastman Kodak Co., 104 F.3d 702, 705 (5th Cir.), cert. denied, 522 U.S. 932 (1997). If a prima facie case is shown, an inference of retaliation is established. The burden of proof is shifted to the defendant, who must articulate a legitimate nondiscriminatory reason for the challenged employment action. Shackelford v. Deloitte & Touche. L.L.P., 190 F.3d 398, 408 (5th Cir. 1999). If the defendant introduces evidence which, if true, would permit the conclusion that the adverse employment action was nondiscriminatory, the inference of the prima facie case disappears and the focus shifts to the question of whether the

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[9] Since the Court concludes the claim does not have substantive merit, it prefers to rule on that basis rather than upon a procedural or statutory bar.

defendant unlawfully retaliated against the plaintiff. Long v. Eastfield College, 88 F.3d 300, 305, fn. 4 (5th Cir. 1996). Summary judgment is appropriate unless the plaintiff proves that the defendant's explanation is pretextual. Shacklford, 190 F.3d at 408.[10]

A plaintiff may avoid summary judgment only if the evidence, taken as a whole: (1) creates a fact issue as to whether the employer's stated reasons was not what actually motivated it; and (2) creates a reasonable inference that race was a determinative factor in the challenged actions. The plaintiff must present evidence sufficient to create a reasonable inference of discriminatory intent. Grimes v. Texas Dept. of Mental Health & Mental Retardation, 102 F.3d 137, 141 (5th Cir. 1996).

The ultimate issue in an unlawful retaliation case is whether the defendant discriminated against the plaintiff because the plaintiff engaged in protected activity. Long, 88 F.3d 300 (5th Cir. 1996). In order to ultimately prevail in a retaliation claim, the plaintiff must show that the protected conduct was a "but for" cause of the adverse employment action. Scrivner v. Socorro Independent School District, 169 F.3d 969 (5th Cir. 1999). "In other words, even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct."

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[10] If there is close timing between the protected activity and the adverse employment action, the employer must offer a legitimate, nondiscriminatory reason that explains the adverse action and the timing. Id., Here, the reference issue arose over two years after the lawsuit had been filed.

Long, 88 F.3d at 305, fn. 4. See also: Casarez v. Burlington Northern/Santa Fe Co., 193 F.3d 334 (5th Cir. 1999).[11]

Tulane does not dispute ex-employee Bernofsky's standing to sue for retaliation under Robinson v. Shell Oil Co., 519 U.S. 337 (1997), and admits that the Fifth Circuit has not addressed whether or under what circumstances a negative reference would qualify as an adverse employment decision. Tulane first argues that a negative reference alone does not constitute an adverse employment action and that, in any event, Bernofsky would have to show that he was not employed by the prospective employer because of the negative reference or silence. Bernofsky argues in opposition that the dissemination of a negative reference with discriminatory intent, not the non-hiring by the prospective employer, qualifies as an adverse employment action, relying on Hashimoto v. Dalton, (9th Cir. 1999).

The Fifth Circuit "has analyzed the 'adverse employment action' element in a stricter sense than some other circuits." Burger, 168 F.3d at 878. The Fifth Circuit holds that the requirement is met with only "ultimate employment decisions, not ... every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." Mattern, 104 F.3d at 707.

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[11] The standard for establishing the causal link in the prima facie case is less stringent. Long, 88 F.3d at 305, fn. 4. The Second Circuit in Sarno v. Douglas Elliman-Gibbons & Ives. Inc., 183 F.3d 155, 160 (2d Cir. 1999), indicated that the employee must show that the statements "caused or contributed to the rejection by the prospective employer" with regard to the prima facie case but did not, as suggested by the plaintiff, establish that lesser causation governed the ultimate causation issue.

> To hold otherwise would be to expand the definition of "adverse employment action" to include events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee--anything which might jeopardize employment in the future. Such expansion is not warranted.

Mattern, 104 F.3d at 708 (emphasis added). In Mattern, the Fifth Circuit identified ultimate employment decisions to include hiring, granting leave, discharging, promoting and compensating. Mattern, 104 F.3d at 706-707.

The Fifth Circuit recently acknowledged that its narrow view of what constitutes an adverse employment decision is the minority view throughout the country. Burger, 168 F.3d at 877, fn 3. Our sister circuit, the Eleventh, has specifically rejected the Fifth Circuit view as being "inconsistent with the plain language" of the statute. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (llth Cir. 1998). In so doing, the Eleventh Circuit joined the First, Ninth and Tenth Circuits in finding that retaliatory discrimination extends to adverse decisions that do not rise to ultimate employment decisions. 141 F.3d at 1455-1456. This Court for one would welcome a revisiting of the issue by the Fifth Circuit. See Mattern, (Dennis, J. dissenting).

The Fifth Circuit would require, at a minimum, that an adverse employment action must involve some determinative negative employment impact on the plaintiff. Therefore, Tulane's letter or silence could not constitute an ultimate employment decision if it affected no other employment decision. Being bound by Fifth Circuit jurisprudence, this Court concludes that the relevant adverse employment action here is the prospective employer's failure to hire, not the mere issuance of a negative reference letter or silence on the part of the former employer standing alone.

Again, in light of the Fifth Circuit jurisprudence, a formidable issue in this case is whether the issuance of the Beal reference letter to Wolinsky or Tulane's silence in response to Campbell's request was a determinative factor in the failure of the University of Houston or Michigan Technological University to hire Bernofsky.

It is undisputed that Bernofsky can not show that any of the universities to which he applied either had an open position or were at that time hiring. Bernofsky argues that:

> Tulane argues ... that funding was integral to Bernofsky's ability to secure another position and implies that his lack of grant funding was a basis of his unsuccessful job search. This attempt to deflect blame from itself is negated by the fact that Bernofsky only applied for administrative and teaching positions for which he deemed himself qualified. He did not apply for any purely research position.

(Rec. Doc. 77, p. 46). Therefore, any issue raised by Bernofsky regarding the actual amount of Air Force funds, if any, he had at the time of termination would be irrelevant since funding was not a consideration in the positions sought. Bernofsky agrees that both contacts at the two subject universities were friends and aware of his good reputation before sending the letters of request to Tulane.

The plaintiff presents deposition testimony from the plaintiff's friends at the two universities who testified that they wanted to help Bernofsky. Wolinsky testified that he anticipated a position opening soon at the University of Houston due to the anticipated departure of another faculty member. Wolinsky also testified he was "keeping my eyes open" and anticipated introducing Bernofsky to other people on campus who might have positions that he "might" qualify for. (Rec. Doc. 72, Exh. D,

p. 28). Wolinsky testified that he could not have gone further in helping Bernofsky upon learning of the pending litigation. Wolinsky also testified to his concern about Bernofsky's veracity raised by the letter's statement that his position was eliminated due to a lack of research funds, contrary to Bernofsky's curriculum vitae. Campbell testified that there was no specific search going on for new faculty but that he thought there was a "possibility" Bernofsky could be hired in a research position. Campbell testified to his inability to proceed with his inquiry due to the lack of references from Tulane. However, Bernofsky offers no proof that an actual position was available or would have been created for Bernofsky "but for" the reference or lack thereof, or that the reference or lack thereof was a determinative factor in his not being hired.

Even assuming, for purposes of the motion and despite the Fifth Circuit requirements, that the reference letter and/or Tulane's silence could be construed to have adversely impacted the two universities' "ultimate employment decision" to not hire Bernofsky, the defendant has offered a legitimate nondiscriminatory reason for the action it took. The defendant claims the letter to Wolinsky was substantially accurate and was in response to an inquiry on behalf of Bernofsky. Furthermore, the letter disavowed any negative inferences as to Bernofsky's performance and identified lack of funding as the sole reason for dismissal, even though performance issues did play a part in Bernofsky's termination. With respect to the failure to respond to Campbell's inquiries, Tulane explains this as simple inadvertence and not a deliberate silence. In light of all the evidence, the Court is convinced that these explanations are valid. It is at this juncture where this Court finds that the plaintiff's claim collapses, even assuming it has survived the procedural and substantive hurdles already encountered.

With respect to the Beal letter, the plaintiff does not attack the letter as a whole, but rather two specific statements in the letter which the plaintiff claims were retaliatory - one, that

Bernofsky had pending litigation "against Dr. Karam personally" and two, that Bernofsky's position at Tulane was eliminated because Bernofsky no longer had "any" research funds to support his position. The plaintiff claims neither of these statements was in fact true, ergo they were retaliatory.

The Court finds that the statements were substantially true, and even if technically inaccurate, they were not retaliatory. With regard to the reference to Karam, as pointed out at the outset of this opinion, even though Bernofsky had named Tulane as the actual defendant in the underlying litigation, the content of the accusations were directly solely at Karam. Bernofsky accused Karam of harassment, dispersing false information and scheming against him. Bernofsky blamed his termination on Karam and alleged that Karam took all these actions because he was anti-Semitic and prejudiced against older people. As Beal explained, "the target of the lawsuits is certainly Dr. Karam. The individual he alleges committed the wrongful acts is Dr. Karam. While he has not named Dr. Karam, he certainly has targeted Dr. Karam." (Rec. Doc. 72, Exh. C, p. 11). Consequently, in explaining to Wolinsky why he had instructed Karam not to respond, Beal was substantially accurate in opining that the litigation was against the university and also against Karam "personally."

With regard to the reference to research funds, the plaintiff claims that Beal's statement that Bernofsky's position was eliminated because he no longer had "any" research funds was untrue because the Air Force had approved a grant application in April, 1995, virtually simultaneously with Bernofsky's formal termination.

It is undisputed that from May, 1994 through Bernofsky's termination, Karam had repeatedly advised Bernofsky that Tulane would no longer subsidize his salary and he needed to raise the funds for that purpose. He was advised on January 31, 1995, that he was being terminated effective February, 1995, because of his

failure to do so. Bernofsky filed suit at the end of January and this Court put his employment status "on hold" pending settlement discussions between the parties. The settlement discussions were unsuccessful, Bernofsky was terminated effective April, 1995, and in a June, 1995 letter to the Dean of the Medical School, Karam advised that "Termination of this position is due to lack of current research funding by the faculty member." Beal's letter to Wolinsky accurately reported the reason stated by Karam for Bernofsky's termination.

The Air Force grant was apparently approved in April, 1995. While the underlying record is silent as to how the impending grant was dealt with during the settlement discussions prior to formal termination, it is clear that even with $13,679 earmarked for Bernofsky's salary, Tulane would still be left shouldering nearly 80% of his faculty pay. This had been par for the course for a number of years and Karam had made it clear that it was unsatisfactory. Again, however, Beal correctly reported to Wolinsky the reason stated by Karam for Bernofsky's termination.

Even if the two disputed statements in Beal's letter can be construed as inaccurate, in the overall context, the plaintiff cannot establish that they were retaliatory.

Despite filing a lawsuit against Tulane, and specifically accusing Karam solely of all the discriminatory treatment alleged, Bernofsky nonetheless identified Karam as a reference in his applications for employment at other universities, including his inquiry to Wolinsky. His other two references were Stjernholm and Steele, two of the three faculty members who authored the critical evaluation provided to Karam, which commenced the process leading to his termination. Bernofsky did not so without asking their permission or even notifying them on his intentions and while his underlying litigation was still active and ongoing. Beal testified that it was medical center policy for the legal office to review any reference letters solicited from individuals involved in litigation. He noted Bernofsky's failure to approach the

university about the references in advance and he cited concern among the faculty members that this was an "attempt to set them up," a legitimate concern.[12] (Rec. Doc. 72, Exh. C, p. 22-23).

None of this was expressed in the Beal letter. In fact, to the extent Beal's letter is inaccurate, it is inaccurate in Bernofsky's favor in painting a unduly rosy picture as to his termination. It is noteworthy that Karam, Stjernholm and Steele expressed other serious dissatisfaction with Bernofsky's performance, in addition to his failure to garner grant money to support his salary. Bernofsky was criticized for his failure to teach, his lack of committee participation, his reclusiveness, his diminishing research output and his publications in obscure, as opposed to recognized, journals. None of that was expressed in Beal's letter. Indeed, Beal's letter expressly stated that Bernofsky's dismissal "was not based upon any performance issues, but was strictly a financial decision due to lack of research funds." Beal also stated in the letter that "Lack of response form Dr. Karam, Dr. Steele or Dr. Stjernholm personally should not indicate any negative information relative to Dr. Bernofsky, but is necessitated because of the pending litigation." As Beal testified, to say that Bernofsky's dismissal was not based on any performance issues "was a stretch." (Rec. Doc. 72, Exh. C, p. 23). And to say that silence from Drs. Karam, Steele and Stjernholm should not be construed as negative was contrary to their actual evaluations. Nevertheless, Beal testified that his intent was to put "Dr.

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[12] Bernofsky listed as his only references individuals, in particular Karam, who were pivotal in his negative evaluations and termination from Tulane. Had any of the three written letters that were favorable in some way, Bernofsky could have used them in the ongoing litigation to refute the nondiscriminatory reasons given for his termination. Had the letters been unfavorable, Bernofsky could have used them, as he is attempting to use the Beal letter, to show retaliation. The three individuals were in a "damned if you do, damned if you don't" dilemma.

Bernofsky in the best light" so that his dismissal would not be perceived as performance based, but rather as a failure of funding "which is very common in academia." (Rec. Doc. 72, Exh. C, p. 23-24). The fact that Bernofsky has to parse Beal's letter so finely to criticize it only underscores the thundering absence of what Beal could have said had he wished Bernofsky ill.[13] The Beal letter not only is not retaliatory, but it bends over backwards not to cause him harm.

Likewise, Tulane has offered a valid, nonretaliatory reason for failing to respond at all to the inquiry from Campbell, namely that the inquiry simply was mislaid, or fell through the cracks. In light of what could have been reported to Campbell regarding the opinions of the three referenced professors, and in light of how Beal handled the inquiry from Wolinsky, Bernofsky utterly fails to produce any persuasive evidence that the silence was retaliatory.

Bernofsky alleges a number of factual contentions. He identifies them as relevant to "malicious intent" on the part of Tulane. Most of them are irrelevant to the "reference " claims of retaliation at issue here. Instead, most seek to revisit the issue of discriminatory and retaliatory discharge, or to use the evidence presented in that case to indirectly relitigate the issue of intent surrounding his termination. Specifically, Bernofsky argues that his termination was retaliatory; that he was not terminated due to a lack of funds, that he was treated discriminatorily during his employment at Tulane when compared to others, that Tulane tried to "thwart" his Air Force grant application, that Beal harassed Bernofsky by insisting that he abandon his laboratory at Tulane after his termination, that Tulane defamed Bernofsky by

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[13] Even had Beal disclosed the various evaluations by the three professors to Wolinsky, presumably that would not be found retaliatory either since the evaluations had in fact been made and were part of the termination process.

terminating him prior to the end of his alleged contract, that Tulane "subverted" an employment opportunity for Bernofsky by not letting him maintain his laboratory after he had been terminated, that Tulane discriminatorily denied him disability benefits in 1995,[14] breach of employment contract at Tulane, illegal seizure of Bernofsky's equipment in conjunction with his termination, Tulane's failure to provide a forwarding address for Bernofsky in 1995, Tulane's interception of mail after his termination, Tulane's cancellation of library privileges at Tulane after his termination and Tulane's failure to forward messages after his termination.[15] These allegations are familiar. To the extent that Bernofsky seeks to relitigate the issue of discriminatory or retaliatory intent with regard to his discharge, this Court finds that the lack of such intent has been determined in his first lawsuit and that determination is now final. To the extent that Bernofsky seeks to establish impermissible intent with regard to the current reference retaliation claims, the fact that Tulane did not discriminate or retaliate in terminating Bernofsky is no less final. To the extent that Bernofsky is arguing that Tulane's reason for terminating him, for writing the letter of reference to UH or not responding to the MTU request for a reference, are pretextual, the factual allegations are insufficient to remove the inference of impermissible retaliation or discrimination on this motion for summary judgment. Shackelford, supra. Finally, to the extent that these familiar facts are offered to create a reasonable

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[14] That disability claim was the subject of Bernofsky's second lawsuit filed on May 27, 1998, and was dismissed by the plaintiff on July 27, 1998, after the Court determined that the claim was governed by ERISA . Teachers Ins. & Annuity Assn., Civ. Act. 98-1577 "C". (Civ. Act. 98-1577 "C", Rec. Doc. 21).

[15] This would include nearly all of the facts and arguments set forth between pages 34 and 51 of the plaintiff's opposition. (Rec. Doc. 77).

inference of discriminatory intent with regard to the claims of reference retaliation, the Court finds that they are insufficient as a matter of law. Bernofsky offers no new facts sufficient to create a reasonable inference of discriminatory intent with regard to the reference retaliation alleged. Grimes, supra. Therefore, summary judgment on the retaliation claims is appropriate.

Defamation

In order to establish a defamation claim under Louisiana law, the plaintiff must prove the following: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault (negligence or greater) on the part of the publisher; and 4) resulting injury. Trentacosta v. Beck, 703 So.2d 552, 559 (La. 1997).[16] In order to prevail in a defamation action, the plaintiff must prove that "the defendant, with actual malice or other fault, published a false statement with defamatory words which caused plaintiff damages." Sassone v. Elder, 626 So.2d 345, 350 (La.1993), cited in Trentacosta, 703 So.2d at 559.

For the reasons already stated, the Court finds that the two disputed remarks in the Beal letter were substantially accurate, hence the first element of the defamation claim fails. Even if the disputed remarks were inaccurate, the Court concludes they were not defamatory. Defamation is defined as words which "tend to harm the reputation of another so as to lower him or her in the

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[16] Although the plaintiff argues facts relative to the lack of response to the request for a reference from MTU, he does not clearly indicate that these facts comprise a separate claim of defamation. In addition, he does not address the publication requirement with regard to that claim. A defamatory action requires communication of defamatory words to someone other than the person defamed. Crooms v. Lafayette Parish Gov't, 628 So.2d 1224, 1226 (La. App. 3rd Cir. 1993).

estimation of the community or to deter third persons from associating or dealing with him or her." Sassone, 626 So.2d at 352.

> Whether a particular statement is objectively capable of having a defamatory meaning is a legal issue to be determined by the court, considering the statement as a whole, the context in which it was made, and the effect it is reasonably intended to produce in the mind of the average listener.

Bell v. Rogers, 698 So.2d 749, 754 (La. App. 2nd Cir. 1997).

The focus then is whether stating that Bernofsky had filed litigation against Karam "personally" when in fact Karam was not named as an actual defendant in the suit and stating that Bernofsky was terminated because didn't have "any" grant money, when arguably he had some, was defamatory in the context of the overall letter. The answer is "no." The truth is that even though Karam was not a named defendant he was "named" by Bernofsky throughout the petition as the specific and only cause of his grief, including his termination. The allegations against Karam were personal and direct. That Beal may have inaccurately implied in his letter that Bernofsky actually named Karam as a defendant in the suit hardly would cause the average listener to shun Bernofsky or think less of his reputation. Whether or not Bernofsky could have sued Karam personally is a legal question with no reputation connotation at all .

Bernofsky cites testimony from Wolinsky that having litigation against the chairman of the department from a prior employment is a "kiss of death" to finding a new position since any new appointment would have to be approved by that chairman. However, the "kiss of death" comes from targeting the chairman personally and specifically in the litigation as Bernofsky indisputably did, regardless of whether he was specifically named as a defendant. It is specious to argue that a prospective employer

would disregard the nature of the allegations in a prior lawsuit and only be concerned about whether a prior employer had been actually named a defendant. With regard to the funding issue, as already noted, Beal accurately reported the reason Karam gave to the Medical School Dean for Bernofsky's termination. Furthermore, even assuming the "too little too late" grant of April, 1995, could have provided some marginal funding for Bernofsky's salary had he been retained, it still wasn't enough to fulfill Karam's conditions for continued employment. Consequently, stating that Bernofsky was terminated because he hadn't "any" grant funding as opposed to being terminated for having woefully insufficient grant funding would not cause an average person to think less of his reputation[17].

Even assuming for purposes of this argument, that the Beal comments were inaccurate and were "defamatory", the Court finds a complete failure in proof as to the defendant's alleged malice, actual or implied. For the reasons previously stated, the Court finds that Beal went out of his way to paint as positive a picture as possible for Bernofsky under the circumstances.

In addition, Tulane argues that it is entitled to a qualified privilege for its communications with prospective employers regarding Bernofsky. "The employer must be free to make a complete and unrestricted communication without fear of liability in a defamation suit even if the communication is shown to be inaccurate, subject to the requisites that the communication is in

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[17] Bernofsky argues that the inaccuracy caused him damage because it conflicted with the representation he made in his resume that he had received the Air Force grant, indicating possible dishonesty. Bernofsky confected his resume in July, 1995, after his termination and after being advised by Tulane that they would have to inform the Air Force of his dismissal. Bernofsky chose to list the grant without explanation and thereby assumed the risk of any misunderstanding.

good faith, is relevant to the subject matter of the inquiry and is made to a person (or agency) with a corresponding legitimate interest in the subject matter. ... 'This means that the person making the statement must have reasonable grounds for believing that it is true and he must honestly believe that it is a correct statement'." Williams v. Touro Infirmary, 578 So.2d 1006, 1010 (La. App. 4th Cir. 1991), quoting Harrison v. Uniroyal. Inc., 366 So.2d 983 (La. App. 1st Cir. 1978). See also Hines v. Arkansas La. Gas Co., 613 So.2d 646 (La. App. 2d Cir. 1993), writ denied, 617 So.2d 932 (La. 1993); Alford v. Georgia-Pacific Corp., 331 So.2d 558 (La. App. 1st), cert. denied, 334 So.2d 427 (La. 1976).

Bernofsky argues that there is an issue of fact as to Beal's state of mind and purpose and that he could not have reasonable grounds to believe that the two statements were correct. Again, these statements mirror the Tulane's defense at the time the UH letter was written, and this Court findings in the first lawsuit. The Court finds that the statements are sufficiently correct and made in good faith for purposes of this qualified privilege.

Finally, Tulane argues that it is entitled to the statutory privilege set forth in La. Rev. Stat. 23:291A, which provides:

> Any employer that, upon request by a prospective employer or a current or former employee, provides accurate information about a current or former employee's job performance or reasons for separation shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith. An employer shall be considered to be acting in bad faith only if it can be shown by a preponderance of the evidence that the information disclosed was knowingly false and deliberately misleading.

Bernofsky argues that this immunity is not available to Tulane because there is an issue of fact as to whether the statements made

by Beal were accurate or knowingly false and deliberately misleading. He then provides seven pages of familiar fact to establish that Bernofsky's academic performance was not unsatisfactory and that he did not consistently fail to generate grant funds prior to his termination at Tulane.

Dr. Bernofsky may have a deep-seated and heartfelt need to relitigate the issue of why he was terminated at Tulane. However, his opportunity has come and gone. He can not resurrect the issue in the carefully worded letter from Tulane to Bernofsky's friend at UH regarding a nonexistent position, or from Tulane's silence with regard to MTU's requests.

Accordingly,

IT IS ORDERED that the motion for summary judgment filed by the Administrators of the Tulane Educational Fund is GRANTED.

IT IS FURTHER ORDERED that:

1. The plaintiff's motion in limine regarding testimony about the plaintiff's web site is DISMISSED as moot (Rec. Doc. 56);

2. The defendant's motion in limine regarding enjoining plaintiff from making reference to his contended discriminatory discharge (Rec. Doc. 60) is DISMISSED as moot;

3. The defendant's motion in limine to exclude or limit the expert reports of Barbara Haynie and Thomas Dalton (Rec. Doc. 70) is DISMISSED as moot.

New Orleans, Louisiana, this 18 day of April, 2000.

s/ *Helen G. Berrigan*
HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DR. CARL BERNOFSKY	CIVIL ACTION
VERSUS	NO. 98-1792 c/w 98-2102
ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND	SECTION "C"

ORDER AND REASONS

This matter comes before the Court on motion for recusal, and, in the alternative, to amend judgment and motion for new trial filed by the plaintiff, Dr. Carl Bernofsky ("Bernofsky"). Having considered the record, the memoranda of counsel and the law, the Court finds that denial of both motions is appropriate for the following reasons.

On April 18, 2000, the Court granted summary judgment in favor of Bernofsky's former employer, the Administrators of the Tulane Educational Fund ("Tulane"), dismissing his claims against the Medical School for retaliation under 42 U.S.C. §1981 and Title VII and for retaliation and defamation under Louisiana state law in conjunction with requests for references on employment applications. This motion was filed after judgment was entered against the plaintiff.

Recusal is sought because this Court agreed in November 1999 to teach a three week summer course for Tulane University School of Law in July 2000. The Court will receive a stipend in the amount of $5,500, which will cover costs and expenses associated with teaching the course in Greece. The plaintiff argues that this teaching requires recusal under 28 U.S.C. §455(a)

because this is a proceeding "in which [her] impartiality might reasonably be questioned," and under 28 U.S.C. §455(b)(4) due to her "financial interest . . . in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

Disqualification under Section 455(a) is measured by an objective standard. Levitt v. University of Texas at El Paso, 847 F.2d 221 (5th Cir. 1988), cert. denied, 493 U.S. 970 (1989).

> Because 28 U.S.C. §455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if a reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.

Potashnick v. Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980). Discretion is to be exercised in favor of disqualification if a judge has any question about the propriety of sitting on a case. Id., 609 F.2d at 1112. The Court finds that the teaching of the upcoming summer course at the Tulane Law School does not support recusal under this objective standard. See also U.S. ex rel Hochman v. Nackman, 145 F.3d 1069 (9th Cir. 1998).

For purposes of Section 455(b)(4), a "financial interest" is defined as "ownership of a legal or equitable interest, however small . . ." 28 U.S.C. §455(d)(4). Section 455(b)(4) "requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety." Liljeberg v. Health Services

Acquisition Corp., 486 U.S. 847, 860 fn. 8 (1988). However, this Court finds that there is no "financial interest" in Tulane or in the subject matter of this litigation for purposes of this section. The stipend that will be received is for reimbursable costs and expenses; it is not a salary and does not constitute a legal interest under this definition.[1] See Wu v. Thomas, 996 F.2d 271 (llth Cir. 1993), cert. denied, 511 U.S. 1033 (1994) (adjunct professor who received no salary not recused). See also Swift v. Trustees of Indiana University, 1989 WL 15919 (N.D.Ind. 1989). In addition, the Court finds that there is no "equitable interest" involved here.

However, the Court admits that its research revealed surprisingly little jurisprudence addressing the appropriateness of recusal for teaching at a local law school under either subsection of Section 455. This Court is only one of the many sitting judges who teach at local law schools, although the terms of compensation (or lack thereof) would vary among us. In addition, the Court is mindful of the Code of Conduct for United States Judges advice on "Law School Teaching":

> §3.4-3(a) A judge who teaches at a law school should recuse from all cases involving that [educational] institution as party. The judge should recuse (or remit) from cases involving the university, as well as those involving the law school, where the judge's impartiality might reasonably be questioned in view of the size and cohesiveness of the university, the degree of independence of the law school, the nature of the case, and related factors. Similar factors govern

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[1] It is unclear whether the plaintiff is arguing that recusal is required under Section 455(b)(4) for "any other interest that could be substantially affected by the outcome of this proceeding." To the extent that argument is raised, the Court finds that such an interest is lacking.

> recusal of judges serving on a university advisory board.

Unfortunately, this rule does not provide clear guidance either. The first sentence does not distinguish between paid and unpaid teaching positions, and it is unclear whether the first sentence's "that institution" refers only to the law school as a party. In the second sentence, "that institution" is not mentioned at all, and the university of which the law school is a party is described as such.[2]

While this Court believes that recusal is not appropriate, it would welcome clear guidance from a higher Court on the issue raised herein. In this ruling, the Court acknowledges its duty to decide the cases assigned to it. It can not recuse simply because a party wants it to, or because it has previously ruled against the party seeking recusal, however attractive such an option might be in protracted and difficult litigation such as this.[3]

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[2] Of course, Tulane Law School has no involvement here.

[3] The current lawsuit is a derivative of an earlier complex lawsuit which was dismissed by this Court on a defense motion for summary judgment and upheld by the Fifth Circuit. Knowledge of the history of the previous litigation was essential to evaluating the merits of the current litigation, a knowledge this Court already had but which would require a new judge to independently amass. This frankly was a factor in this Court's decision to "keep" the case at this juncture rather than recuse. But as the Court has previously advised the Fifth Circuit, the Court has been concerned about the distraction caused the litigation by Dr. Bernofsky's conviction that the Court is biased. We have simply felt that, objectively, recusal is not justified under the circumstances, at least under the current state of the caselaw, and therefore the Court had an obligation not to recuse.

No new arguments are raised pertaining to the motion to reconsider and/or motion for new trial. The plaintiff's arguments are best directed to the Court of Appeals.

Accordingly,

IT IS ORDERED that the motion for recusal, and, in the alternative, to amend judgment and motion for new trial filed by the plaintiff, Dr. Carl Bernofsky, are DENIED.

New Orleans, Louisiana, this 30 day of May, 2000.

s/ *Helen G. Berrigan*
HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-30704

CARL BERNOFSKY, DR.,

Plaintiff - Appellant,

versus

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND,

Defendant - Appellee.

Appeal from the United States District Court for
the Eastern District of Louisiana
(USDC No. 98-CV-2102-C)

Before KING, Chief Judge, REAVLEY and JONES, Circuit Judges.

PER CURIAM:*

The judgment of the district court is affirmed. The decision of that court against recusal is upheld for the reasons given by that court's order. On the merits, even if Tulane's response to the requests for reference be considered as adverse

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

employment actions, there was no error of any significance and Bernofsky presents no evidence of improper motive or defamation.

AFFIRMED.

KING, Chief Judge, dissenting:

With respect, I disagree with the panel majority on the matter of Judge Berrigan's recusal. A reasonable person would view the summer teaching assignment in Greece that Tulane Law School offered to Judge Berrigan, along with $5,500 to cover her expenses, as something of a plum. She accepted that assignment in the midst of this litigation against the Administrators of the Tulane Educational Fund, indeed on the eve of her decision to grant summary judgment in favor of the Fund. Under the circumstances (and with a record devoid of any evidence of attenuation in the relationship between the Fund and the Law School), I think that a reasonable person might question her impartiality. I would reverse the judgment and remand with instructions to send the case to another judge.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-30704

CARL BERNOFSKY, DR
Plaintiff - Appellant

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND
Defendant - Appellee

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

(Opinion 4/10/01, 5 Cir., _____, _____ F.3d _____)

Before KING, Chief Judge, REAVLEY and JONES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ *Thomas M. Reavley*
United States Circuit Judge

REHG-6a

UNIVERSITY *of* HOUSTON

Department of Human Development and Consumer Sciences Houston, TX 77204-6861 Fax: 713/743-4033
713/743-4110

February 7, 1997

Dr. Rune L. Stjernholm
Professor
Department of Biochemistry
Tulane University School of Medicine
1430 Tulane Avenue
New Orleans, LA 70112

Dear Dr. Stjernholm:

Dr. Carl Bernofsky, formerly of your department, has inquired here about the possibility of an academic position. His training, experience and specialties do have interest for us. Before further investigating possibilities with Dr. Bernofsky, I would like to get an evaluation from you as to his performance in research, teaching and departmental citizenship as a faculty member in your department.

I look forward to hearing from you.

Yours,

s/ *Ira Wolinsky*

Ira Wolinsky, Ph.D.
Professor of Nutrition
Nutrition Laboratory

Carl Bernofsky, Ph.D.
6478 General Diaz Street
New Orleans, LA 70124

April 4, 2000

The Hon. Ginger Berrigan, Judge
United States District Court
Eastern District of Louisiana
500 Camp Street
New Orleans, LA 70130

Re: Carl Bernofsky v. Administrators of the Tulane Educational Fund, USDC ED LA #98-CV-1792 c/w #98-CV-2102

Dear Judge Berrigan:

I recently learned that you are scheduled to teach a three-week course in Greece this summer for which Tulane credit will be given.

The announcement appeared in Tulane Law School's Summer School Abroad 2000 catalog. Your name is listed under "Faculty" on p. 29, and your course, "The Judicial Protection of Human Rights: In Theory and Practice," is described on p. 28. Copies of these pages are enclosed.

Thus, while Tulane was misleading the U.S. Supreme Court six months ago by arguing that you were no longer associated with the University, you were engaged in developing a curriculum and making arrangements with Tulane administrators and other Law School faculty.

This conduct defies U.S. recusal statutes and specifically violates the canon of the Judicial Conference of the United States

that appears in Guide to Judiciary Policies and Procedures, 1999 Ed., Vol. II, Chap. V, § 3.4-3(a), at p. V-39.

Your open affiliation with the defendant and deception regarding this ongoing relationship is incompatible with even the most remote appearance of impartiality and compels me to seek all possible means of appropriate redress that are at my disposal. It is still my hope, however, that you would accept the validity of the above and choose to recuse from my case against Tulane.

Respectfully yours,

s/ *Carl Bernofsky*

Carl Bernofsky
Tel: (504) 486-4639

cc: Victor R. Farrugia
G. Phillip Shuler, III

BERRIGAN.00A